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No. 04-116

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

v.

INEZ PREECE CAMPBELL AND MATTHEW C. BARNECK, SPECIAL ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF CURTIS B. CAMPBELL,
Respondents.

On Petition for a Writ of Certiorari to the Utah Supreme Court

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Utah Supreme Court, like many other state and lower federal courts, has misunderstood and misapplied the guidance on judicial review of punitive damages awards that this Court set out in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America (the Chamber) respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case. Letters from petitioner and respondents indicating consent to file have been filed with the Clerk.[1]

INTEREST OF AMICUS CURIAE

The Chamber is the nation's largest federation of business companies and associations. The Chamber has an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every industry sector and from every region of the country. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business.

The Chamber is filing this brief in support of the petition for a writ of certiorari because the rational and equitable administration of punitive damages is a matter of profound concern to the Chamber's members. The Chamber's members welcomed this Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell* ("*State Farm I*"), 538 U.S. 408 (2003), which they viewed as providing much needed guidance on judicial review of punitive damages awards. The Chamber is concerned, however, that many state and lower federal courts have misunderstood or failed to adhere to the guidelines set out in *State Farm I*. The decision that the petition for a writ of certiorari asks this Court to review – the ruling of the Utah Supreme Court on remand from this Court's

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[1] Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part. No person or entity other than the Chamber and its members made a monetary contribution to the preparation and submission of this brief.

decision in *State Farm I* – is illustrative of the problem. Unless this Court reiterates and reaffirms the principles set out in *State Farm I*, the lack of uniformity in judicial review of punitive damages awards across the nation will prevent *State Farm I* from achieving its promise. American businesses will remain subject to arbitrary and excessive punishments precluded by the Due Process Clause.

The Chamber therefore respectfully submits this brief urging the Court to grant the petition for a writ of certiorari in this case in order to end the confusion in the state and lower federal courts and to ensure the integrity of this Court's mandate in *State Farm I*.

REASONS FOR GRANTING THE WRIT

This case presents a recurring issue of tremendous importance to American business – how to ensure the sound and fair administration of punitive damages awards in the nation's courts. In response to "skyrocketing" and "wholly unpredictable" punitive awards, *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 10, 12 (1991) (internal quotation marks omitted), this Court has repeatedly grappled with the extent to which the Constitution limits the imposition of those awards. By the time of its most recent decision on the subject in *State Farm I*, the Court had firmly established that due process imposes both procedural and substantive limitations on punitive damages, and that the constitutional requirements include judicial review to ensure that punitive awards are neither arbitrarily imposed nor excessive in amount. *See State Farm I*, 538 U.S. at 416-18.

In *State Farm I*, the Court provided detailed guidance to state and lower federal courts on how to review punitive damages awards to ensure that they are not excessive and that the defendants had fair notice of the potential amount of the awards. The Court elaborated on each of the three guideposts that it had previously instructed reviewing courts to consider: (1) the degree of the reprehensibility of the defendant's mis-

conduct; (2) the ratio between the punitive damages award and the harm suffered by the plaintiff; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *See* 538 U.S. at 418. *State Farm I* was widely hailed as a watershed decision that promised at last to bring order and rationality to judicial review of punitive damages awards.[2] Unfortunately, because state and lower federal courts have neither fully understood nor correctly applied the guidance that the Court provided in *State Farm I*, its promise has not been realized. And, unless this Court reiterates and reinforces that guidance, its promise will never be realized.

The ruling that the petitioner requests this Court to review, the opinion of the Utah Supreme Court on remand from this Court's decision in *State Farm I*, vividly illustrates that further guidance from this Court is imperative. As explained in the petition for a writ of certiorari, the Utah Supreme Court has

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[2] *See, e.g.*, David G. Savage, *Justices Act to Restrict Punitive Damage Awards: The Supreme Court Ruling is a Move to Control "Irrational and Arbitrary" Verdicts*, L.A. Times, Apr. 8, 2003, at 1 ("The . . . ruling sends a stern warning to state judges and juries to rein in excessive awards."); Editorial, *Punitive Damages on Trial*, Chi. Trib., April 12, 2003, at C26 ("The high court drew some badly needed guidelines on what is reasonable when the courts award punitive damages in civil cases."); Editorial, *Fair Punitive Damage Limits Set*, Business Insurance, Apr. 14, 2003, at 8 ("[The decision is] another welcome guidepost to the type of fair, balanced and predictable civil justice system that the American people and businesses both need and deserve."); Michael Hoenig, *Supreme Court Limits Punitive Awards*, N.Y. Law Journal, Apr. 14, 2003, at 3 ("[T]he U.S. Supreme Court clarified the outer boundaries of punitive damages and eclipsed any hopes . . . that punitive damages could continue to be unbridled windfalls given by angry juries."); Thomas R. Newman & Steven J. Ahmuty, Jr., *Appellate Review of Punitive Damages*, N.Y. Law Journal, Apr, 16, 2003, at 3 ("[The holding] provides the clearest guidance to date concerning the permissible size of punitive damages."); Lorraine Woellert & Mike France, *Tort Reform Has Friends in High Places*, Bus. Week, Apr. 21, 2003, at 78 (arguing that "[t]he ruling should inject a level of predictability into high-stakes litigation").

misunderstood and misapplied the instructions that this Court gave on each of the three guideposts for review of punitive damages awards. Those mistakes are not isolated errors by a single court that has alone failed to understand this Court's mandate. Examination of the 76 cases in which state and lower federal courts have reviewed punitive damages awards for compliance with due process in the wake of *State Farm I* reveals that the Utah Court's errors are symptomatic of widespread misapplication of this Court's decision. Although a few courts are correctly and faithfully applying *State Farm I*, many other courts are not.[3]

This Court should grant the petition for a writ of certiorari to clarify the principles set out in *State Farm I* and to ensure the correct and uniform application of that decision by the state and lower federal courts. Granting the petition will enable the Court not only to reaffirm the guidance that it provided in *State Farm I* but also to remind state and lower federal courts that they have an obligation to adhere to the Court's mandate when cases are remanded to them.

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[3] The cases analyzed in this brief include only those cases reported in Westlaw and Lexis in which courts, after *State Farm I*, reviewed punitive damages awards for compliance with the federal due process guarantee. We have excluded from the analysis cases that were decided under state law or in which there was a statutory cap on punitive damages that might have influenced the court's due process analysis. We have also excluded cases in which the court was imposing punitive damages in the first instance, cases reviewing arbitration awards (which are subject to a narrower standard of review), bankruptcy cases, and wrongful death cases in Alabama (because compensatory damages are not permitted in such cases). A full list of the cases included in our analysis is reprinted in an appendix to this brief. *See* App., *infra*, 1a-18a.

A. The Petition Should Be Granted To Ensure The Correct And Uniform Application Of *State Farm I* By The State And Lower Federal Courts

1. State Farm I *has had some positive impact.*

State Farm I has not been without some success in curbing arbitrary and excessive punitive damages awards. A number of state and federal courts appear to understand the decision and to be committed to applying it faithfully. For example, in *Williams v. Conagra Poultry Co.*, 2004 WL 1752583 (8th Cir. Aug. 6, 2004), a case involving a hostile work environment in violation of 42 U.S.C. § 1981, the court of appeals reduced a punitive damages award of more than $6 million to $600,000 – an amount equal to the compensatory damages. In arriving at that figure, the court noted that the compensatory damages were substantial and the defendant's conduct, while sufficiently reprehensible to justify some punitive damages, was not so egregious that it justified an unusually large award. The court specifically relied on this Court's guidance in *State Farm I* that, when compensatory damages are substantial, a 1-to-1 ratio between punitive and compensatory damages will often be the highest ratio permitted by due process. *See* 2004 WL 1752583 at *8.

Similarly, in *Johnson v. Ford Motor Co.*, 2003 Cal. App. Unpub. LEXIS (Nov. 25, 2003), *review granted*, 2004 Cal. LEXIS 2549 (Mar. 24, 2004), the court reduced a punitive damages award of $10 million to $53,435 – three times the compensatory damages. The court explained that the conduct was not particularly egregious because it caused only economic injury, but the compensatory damages awarded were not large and did not include a punitive component. *Id.* at *7-*8.

In several other decisions as well, courts have carefully and conscientiously applied this Court's guidance in *State Farm I* to the relevant facts and appropriately vacated or reduced the punitive damages awards. Those cases demonstrate that the guidelines set out by the Court in *State Farm I* can rein in puni-

tive damages awards if courts understand them correctly and implement them faithfully.[4]

2. *Many punitive awards are still excessive even after they have been reduced on judicial review.*

Several other state and federal courts have, in reliance on *State Farm I*, substantially reduced the size of multi-million dollar punitive damages awards. For example, in *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793 (Cal. Ct. App. 2003), the court reduced an award of $290 million to $23.7 million. In *Henley v. Philip Morris*, 9 Cal. Rptr. 3d 29 (Cal Ct. App. 2004), the court reduced an award of $50 million to $9 million. And, in this very case, the Utah Supreme Court reduced the punitive damages award substantially – from the $145 million award vacated by this Court to an award of slightly more than $9 million. There have been comparable reductions in the amount of damages in other cases.[5] Unfortunately, however,

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[4] *See, e.g., DiSorbo v. Hoy*, 343 F.3d 172 (2d Cir. 2003) (reducing $1.275 million award – 3.2 times compensatory damages – to $75,000 – 0.3 times compensatory damages); *United States v. Bailey*, 288 F. Supp. 2d 1262 (M.D. Fla. 2003) (vacating $3 million award because conduct was not sufficiently reprehensible to justify a punitive award); *Waits v. City of Chicago*, 2003 WL 21310277 (N.D. Ill. June 26, 2003) (unpublished) (reducing $2 million award – more than 133 times compensatory damages – to $45,000 – three times compensatory damages); *Daka, Inc. v. McCrae*, 839 A.2d 682 (D.C. App. 2003) (vacating $4.8 million award – 25.7 times compensatory damages – and remanding for recalculation); *Blust v. Lamar Adver. Co.*, 2004 Ohio App. LEXIS 2167 (2004) (vacating $2.245 million award – more than 70 times compensatory damages – and remanding for a new trial); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651 (S.D. 2003) (vacating $500,000 award – 20 times compensatory damages – and remanding for new trial on punitive damages).

[5] *See, e.g., TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003) ($108 million reduced to $29.125 million); *Eden Electrical, Ltd. v. Amana Co.*, 258 F. Supp. 2d 958 (N.D. Iowa 2003) ($17.875 million reduced to $10 million), *aff'd*, 370 F.3d 824 (8th Cir. 2004); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark. 2003) ($63 million reduced to $21 million), *cert. denied*, 124 S. Ct. 535 (2003); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736 (Cal. Ct. App.

the awards in many of those cases (including this one) remain excessive even after they have been reduced, in large part because the reviewing courts have not fully and faithfully applied this Court's instructions in *State Farm I*.

Of the 76 cases in which courts have reviewed punitive damages awards since *State Farm I*, the awards in 35 (more than 46%) of the cases are a million dollars or more. *See* App., *infra*, 1a-11a. Ten of the awards exceed even $20 million, and one court has approved an award of $4.5 billion.[6]

3. Courts repeatedly misapply the State Farm I *guidelines.*

Even more troubling than the persistence of large awards is the fact that many courts, like the Utah Supreme Court here, are failing to apply *State Farm I* fully and faithfully. The errors being made by the state and lower federal courts involve all three of the guideposts for judicial review that the Court elucidated in *State Farm I*. But the most readily apparent mistakes concern application of the second guidepost – the ratio of the punitive damages award to the harm suffered by the plaintiff.

2003) ($14 million reduced to $1 million); *Taylor Woodrow Homes, Inc. v. Acceptance Ins. Cos., Inc.*, 2003 WL 21224088 (Cal. Ct. App. May 28, 2003) (unpublished) ($5 million reduced to $1 million); *Bocci v. Key Pharms., Inc.*, 76 P.3d 669, *modified on reconsideration*, 79 P.3d 908 (Or. Ct. App. 2003) ($22.5 million reduced to $3.5 million).

[6] *See In re Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2004) ($4.5 billion); *Planned Parenthood, Inc. v. Am. Coalition of Life Activists*, 300 F. Supp. 2d 1055 (D. Or. 2004) ($108.5 million); *Williams v. Philip Morris, Inc.*, 92 P.3d 126 (Or. Ct. App. 2004) ($79.5 million); *S. Union Co. v. Southwest Gas Corp.*, 281 F. Supp. 2d 1090 (D. Ariz. 2003) ($60 million); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003) ($50 million), *cert. denied*, 124 S. Ct. 1423 (2004); *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003) ($29.125 million); *Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole*, 2004 WL 725287 (N.D. Ill. Apr. 1, 2004) ($27.7 million); *Union Pac. R.R. v. Barber*, 2004 WL 352525 (Ark. Feb. 26, 2004) ($25 million); *Romo*, *supra* ($23.7 million); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark. 2003) ($21 million), *cert. denied*, 124 S. Ct. 535 (2003).

a. In *State Farm I*, this Court instructed that, "[w]hen compensatory damages are substantial," punitive damages "equal to compensatory damages" will often "reach the outermost limit of the due process guarantee." 538 U.S. at 425. Applying that principle to the facts of this case, the Court concluded that the compensatory award received by the plaintiffs – $1 million for a year and a half of emotional distress – was substantial. The Court further concluded that those damages already included a punitive component, because emotional distress damages, by their very nature, have a punitive element. *Id.* at 426. The Court therefore concluded that "a punitive damages award at or near the amount of compensatory damages" is likely the largest award that would be consistent with due process in this case. *Id.* at 429.

Despite that clear guidance, the Utah Supreme Court on remand determined that due process permits a punitive award nine times the size of the compensatory award. The Utah Court reasoned that this Court had erred in concluding that the compensatory award contains a punitive element, and further determined that the emotional distress damages awarded to the plaintiffs actually justify a higher punitive award, because conduct that causes emotional harm is "markedly more egregious" than conduct that causes economic harm. Pet. App. 14a-16a. That reasoning turns the guidance provided by this Court in *State Farm I* on its head.

The Utah Court is not alone in its disregard of this Court's instruction that a 1-to-1 ratio of punitive to compensatory damages is the constitutional limit in cases where compensatory damages are substantial. Reviewing courts have approved punitive damages awards with ratios of 2-to-1 or greater in over 80% of the 37 post-*State Farm I* cases in which compensatory awards (or the potential harm estimated by the court) exceeded $250,000. That statistic is sharply out of sync with the clear message in *State Farm I* that, when compensatory damages are already substantial, punitive damages in excess of compensatory damages are justifiable only in extraordinary cases.

In many of the cases in which courts have disregarded the 1-to-1 limit, the courts have not even acknowledged it. For example, in *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003), *cert. denied*, 124 S. Ct. 1423 (2004), the court of appeals approved a $50 million punitive award in a business dispute involving trade secret misappropriation, patent infringement, and fraudulent inducement of a contract. Although that award was more than three times the substantial compensatory award of $15 million, the court did not advert to the instruction in *State Farm I* that a 1-to-1 ratio is generally all that is appropriate when compensatory damages are substantial. Many other cases similarly fail to mention this Court's guidance.[7]

Some courts do acknowledge *State Farm I*'s endorsement of a 1-to-1 ratio but then proceed to ignore it. For example, in *Henley*, the California court noted this Court's instruction that "lower ratios – perhaps as low as 1 to 1 – may 'reach the outermost limit of the due process guarantee' where 'compensatory damages are substantial.'" 9 Cal Rptr. 3d at 72 (quoting *State Farm I*, 538 U.S. at 425). But the court then, without explanation, reinterpreted that instruction to allow a ratio as high as 4-to-1. *See id.* at 73. And the court then proceeded to approve punitive damages of $9 million – six times the "ample"

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[7] *See, e.g., Greenberg v. Paul Revere Life Ins. Co.*, 2004 WL 74630 (9th Cir. Jan. 12, 2004) (4.4 ratio despite $547,445 in compensatory damages for insurance bad faith); *McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225 (N.D. Ala. 2003) (3.6 ratio despite $711,000 in compensatory damages that included emotional distress); *Interclaim Holdings Ltd., supra* (3.3 ratio despite $8.3 million in compensatory damages for breach of fiduciary duty and contract); *Diamond Woodworks, Inc., supra* (3.9 ratio despite $258,570 in compensatory damages for insurance bad faith, fraud, and breach of contract); *Taylor Woodrow Homes, Inc., supra* (3.4 ratio despite $293,000 in compensatory damages for insurance bad faith); *Reading Radio, Inc. v. Fink*, 833 A.2d 199 (Pa. Super. Ct. 2003) (2.7 ratio despite $300,000 in compensatory damages for breach of contract, civil conspiracy, and various economic torts).

compensatory award of $1.5 million. *Id.* Other cases take a similar approach.[8]

Still other courts follow the approach of the Utah Supreme Court in this case and offer rationalizations for departing from the 1-to-1 ratio. For example, in *Hangarter v. Provident Life & Accident Insurance Co.*, 373 F.3d 998 (9th Cir. 2004), the court of appeals refused to reduce the punitive damages to achieve a 1-to-1 ratio in an insurance bad faith case in which the compensatory damages were $1.92 million. The court explained that, in its view, that ratio "is not binding, no matter how factually similar the cases may be." *Id.* at 1014. The court further justified its failure to follow the 1-to-1 guideline on the ground that only one third of the compensatory damages in the case were for emotional distress, while the compensatory award in *State Farm I* was "primarily" for emotional distress. *See id.* at 1015 n.11. The court did not mention, however, that the compensatory award in *Hangarter* was twice as large as the compensatory award in *State Farm I*, so the amount of emotional distress damages in the two cases were not that dissimilar.

In *Hollock v. Erie Insurance Exchange*, 842 A.2d 409 (Pa. Super. Ct. 2004), the court noted the *State Farm I* principle that a large punitive award is not justifiable where compensatory damages are substantial. *Id.* at 421. The court nonetheless ap-

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[8] *See, e.g., Stogsdill v. Healthmark Partners, L.L.C.*, 2004 U.S. App. LEXIS 15276 (8th Cir. July 23, 2004) (noting *State Farm I* statement about 1-to-1 ratio and acknowledging that the compensatory damages were "substantial" but approving a ratio of 4-to-1); *Eden Electrical, Ltd. v. Amana Co.*, 370 F.3d 824 (8th Cir. 2004) (noting *State Farm I* statement about 1-to-1 ratio and acknowledging that compensatory damages were "significant" but approving a ratio of 4.8-to-1); *Shiv-Ram, Inc. v. McCaleb*, 2003 WL 23025586 (Ala. Dec. 30, 2003) (approving punitive award of 2.8 times compensatory damages even after finding that the damages had made the plaintiff whole for her injuries); *Harris v. Archer*, 134 S.W.3d 411, 438-39, 449 (Tex. Ct. App. 2004) (approving a 4-to-1 ratio in a case involving fraud and breach of fiduciary duty after quoting *State Farm I* and noting that the case fell into the 1-to-1 ratio category).

proved a punitive damages award of more than 10 times the compensatory damages of $278,825. *Id.* at 422. The court justified its decision by reasoning that the compensatory damages, which included attorneys' fees, costs, and interest, had no punitive element and therefore differed from the emotional distress award in *State Farm I.* Contrary to that characterization, however, an award of attorneys' fees and interest on those fees does have a punitive element, because it is a departure from the general rule in our judicial system that each party bears its own litigation costs. *See also In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1104 (D. Alaska 2004) (arguing that compensatory award of more than $513 million was not substantial because it was divided among many plaintiffs).

b. Another way that many state and lower federal courts have misinterpreted *State Farm I* is by treating single-digit ratios (especially ratios below 4-to-1) as providing a safe harbor from due process scrutiny. In *State Farm I*, the Court reiterated its guidance from earlier cases that a ratio of 4-to-1 will be "close to the line of constitutional impropriety" in most cases where compensatory damages are not substantial. 538 U.S. at 425 (citing *Haslip*, 499 U.S. at 23-24, and *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996)). The Court also instructed that, even in the most egregious cases, awards exceeding a single-digit ratio between punitive and compensatory damages will rarely satisfy due process. *Id.* A fair reading of the Court's analysis indicates that the Court was describing the *outer* limits of constitutional propriety, not establishing any safe harbors. No ratio, not even a 1-to-1 ratio, provides a shield from due process scrutiny. *See, e.g., Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915). Many courts, however, appear to have mistakenly read *State Farm I* to mean that a single-digit ratio, and particularly a ratio below 4-to-1, immunizes the punitive awards against further due process review.

The view that a single-digit or 4-to-1 ratio is a safe harbor manifests itself in several ways. One manifestation is that

courts frequently reduce awards so that the punitive-to-compensatory ratio is just below 10-to-1 or just below 4-to-1. This case is a good example: the Utah Court repeatedly noted that it had reduced the award to "nine times" the amount of compensatory and special damages. Pet. App. 1a, 19a; *see id.* at 16a (noting 9-to-1 ratio). Similarly, in *Exxon Valdez*, the district court reduced damages to a level of 8.8-to-1 after quoting the statement in *State Farm I* that "[s]ingle-digit multipliers are more likely to comport with due process." 296 F. Supp. 2d at 1106 (quoting *State Farm I*, 538 U.S. at 425). Later in the opinion, the court favorably quoted a Ninth Circuit decision stating that there is "no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio." *Id.* at 1109 (quoting *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003)).

Likewise, in *McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225 (N.D. Ala. 2003), the court stated that "a multiplier of 9 or less means that the punitive damages presumptively passes muster under the Due Process Clause." *Id.* at 1231. Then, after summarily approving the punitive damages awards on several claims because they "easily pass[] the single digit multiplier test," *id.*, the court reduced the punitive award on another claim to 9-to-1, stating that the court hoped it had "found the exact number that will not give [the plaintiff] a dime more than the Fourteenth Amendment allows, and not a dime less." *Id.* at 1237. *See also Bardis v. Oates*, 14 Cal. Rptr. 3d 89, 108 (Cal. Ct. App. 2004) (reducing punitive award to 9.1-to-1 in order to achieve an award "within the single-digit threshold set out in" *State Farm I*).[9]

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[9] Other cases treat 4-to-1 ratios in a similar fashion, reducing awards to 4-to-1 or just below that ratio. *See, e.g., Textron Fin. Corp. v. Nat'l Union Fire Ins. Co.*, 13 Cal. Rptr. 3d 586, 604 (Cal. Ct. App. 2004) (citing *Diamond Woodworks* and reducing punitive award to achieve a 4-to-1 ratio); *Diamond Woodworks*, *supra*, at 762 (reducing punitive damages to 3.9-to-1 ratio after noting that "in the usual case . . . the outer constitutional limit on

The *McClain* case also illustrates another manifestation of the view that single-digit ratios are a safe harbor. Many courts reject due process challenges to punitive awards by doing no more than noting that the ratio of punitive to compensatory damages is within single digits or is less than 4-to-1. For example, in *Marmer v. Unicco Service Co.*, 2003 WL 22462053 (E.D. Pa. Oct. 2, 2003), the court disposed of the claim that the punitive damages award was excessive by citing *State Farm I* and stating that "[a]n award of punitive damages in an amount that is exactly double the award of compensatory damages, is not improper under settled legal standards." *Id.* at *6. Similarly, in *Reading Radio, Inc. v. Fink*, 833 A.2d 199 (Pa. Super. Ct. 2003), the court addressed the due process claim in a footnote that did no more than quote the statement in *State Farm I* that few awards exceeding a single-digit ratio will satisfy due process and state that "[t]he ratio between punitive damages and compensatory damages in this case is slightly greater than a 2 to 1 ratio." *Id.* at 215 n.3. And, in *Austin v. Specialty Transportation Services, Inc.*, 594 S.E.2d 867 (S.C. Ct. App. 2004), the court likewise quoted the ratio discussion in *State Farm I* and then declared, without further analysis, that ratios of between 2-to-1 and 3-to-1 were not excessive. *Id.* at 877.

Even cases that uphold awards after slightly more analysis appear to reflect the belief that ratios below 10-to-1 are immune from challenge. *See, e.g., Zhang*, 339 F.3d at 1044 ("We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case."); *Rhone-Poulenc Agro*, 345 F.3d at 1372 (noting that "the pro-

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the amount of punitive damages is approximately four times the amount of compensatory damages"); *Taylor Woodrow Homes, supra*, at *4 (reducing punitive award to "somewhat less than four times the compensatories"); *Harris v. Archer*, 134 S.W.3d 411, 440 (Tex. Ct. App. 2004) (reducing punitive damages to achieve a ratio of 4-to-1); *see also* cases cited in note 8, *supra*.

portion of punitive damages to compensatory damages does not even approach the possible threshold of constitutional impropriety" because it is "barely above three times the compensatory award of $15 million").

Another manifestation of the view that a single-digit ratio is a safe harbor is that some courts are inflating the denominator in order to bring the ratio within the single-digit range. For example, in *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 2003 WL 21321370 (E.D. Pa. May 30, 2003), an insurance bad faith case, the court did not compare the punitive award of $150,000 to the compensatory award of $2,000. Instead, the court calculated the ratio by comparing the punitive damages to the value of the plaintiff insured's claim under the policy, despite the fact that the insurance company had, albeit belatedly, paid the claim. The court then stated that the resulting ratio of 1-to-1 did not "raise a suspicious judicial eyebrow." *Id.* at *3 (quoting *Gore*, 517 U.S. at 583).

Similarly, in *Trinity Evangelical Lutheran Church v. Tower Insurance Co.*, 661 N.W.2d 789 (Wis.), *cert. denied*, 124 S. Ct. 925 (2003), another insurance bad faith case, the court upheld a punitive award of $3.5 million by comparing it, not to the $17,570 in compensatory damages, but instead to $490,000, the amount the insurer paid to discharge the insured's liability in the underlying accident suit involving the insured and a third party. The dissenting justice noted that there was never any possibility that the insured would have been required to pay that liability, and she charged the court with "manipulation of the ratio for purposes of due process scrutiny." *See id.* at 379 (Sykes, J., dissenting). Similarly, in *Simon v. San Paulo U.S. Holding Co.*, 7 Cal. Rptr. 3d 367 (Cal. Ct. App. 2003), *review granted*, 86 P.3d 881 (Cal. 2004), a breach of contract and fraud case, the court calculated the punitive-to-compensatory ratio using its own estimate of the plaintiff's expectation damages rather than the jury's compensatory award of $5,000 for out-of-pocket damages. The court then noted with approval that the ratio was just over 4-to-1. *See id.* at 390.

c. A final way that state and lower courts have been disregarding the *State Farm I* guidance on ratios is by approving awards with double-digit ratios of punitive to compensatory damages. Seventeen (more than 20%) of the 76 post-*State Farm I* cases have upheld awards with ratios of 10-to-1 or greater. Although many of those cases involve small compensatory awards that might be thought to justify higher ratios, a significant number of the cases involve compensatory awards of several hundreds of thousands of dollars.

For example, in *Southern Union Co. v. Southwest Gas Corp.*, 281 F. Supp. 2d 1090 (D. Ariz. 2003), a case involving illegal interference with a merger by a state government official, the district court upheld a $60 million punitive damages award that was almost 154 times the compensatory award of approximately $390,000. In *Planned Parenthood v. American Coalition of Life Activists*, 300 F. Supp. 2d 1055 (D. Or. 2004), a case in which anti-abortion activists were found to have threatened abortion providers by publishing their names and addresses on posters and Internet websites, the court upheld $108 million in punitive damages, more than 206 times the compensatory damages of approximately $526,000. And, in *Williams v. Philip Morris, Inc.*, 92 P.3d 126 (Or. Ct. App. 2004), the court upheld a punitive damages award of $79.5 million, almost 97 times the compensatory damages of approximately $821,000. Although this Court noted in *State Farm I* that double-digit ratios might conceivably comply with due process where a particularly egregious act results in only a small amount of damages, 538 U.S. at 425, these cases, in which the economic damages totaled hundreds of thousands of dollars, plainly do not fall into that category.[10]

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[10] *See also Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003) (approving ratio of 11.3-to-1 with punitive damages of $2 million and compensatory damages of $176,262); *Hollock*, *supra* (upholding ratio of more than 10-to-1 with punitive damages of $2.8 million and compensatory damages of $278,825); *Collins Entertainment Corp. v. Coats & Coats*

4. The divergence in how state and lower federal courts are applying State Farm I *thwarts the due process protection that the decision seeks to provide.*

Substantial variation in how federal law is applied in different courts across the county is always a concern, but the lack of uniformity in the application of *State Farm I* is especially troubling. The absence of uniformity directly undermines the due process safeguards that this Court sought to provide when it established guidelines for judicial review of punitive damages awards.

Judicial review of punitive damages serves two primary functions under the Due Process Clause. First, it aims to ensure that defendants have fair notice of the penalties to which they are exposed. As this Court has explained, "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *State Farm I*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574). Second, judicial review seeks to eliminate grossly excessive awards. "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* Neither of the goals of judicial review can be effectively achieved if different courts are applying the standards for review of punitive damages in materially different ways.

Many defendants in suits in which punitive damages are imposed operate nationwide businesses and are therefore subject to suit in multiple states and federal judicial districts. Because plaintiffs can frequently choose the forum in which they sue those defendants, the current lack of uniformity among dif-

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Rental Amusement, 584 S.E.2d 120 (S.C. Ct. App. 2003) (approving ratio of 10-to-1 with punitive damages of $1.569 million and compensatory damages of $157,450).

ferent courts makes it virtually impossible for the defendants to predict the penalties to which they may be exposed.

In addition, unless *all* courts adhere to the judicial review guidelines that *State Farm I* prescribes, the guidelines cannot effectively curb grossly excessive awards. Plaintiffs can choose to file their suits in those forums that do not rigorously apply the guidelines to curb excessive awards. Even apart from forum shopping, political pressures may prevent the guidelines from curbing excessive awards unless this Court sends a signal that the guidelines must be followed in all jurisdictions. As long as courts in some jurisdictions are applying the guidelines in a manner that does not prevent excessive awards, there may be political pressures on judges in states with elected judiciaries to follow suit.

It is thus imperative for this Court to provide further clarification of the standards that it set out in *State Farm I* and to send a strong message that the Court expects all state and federal courts to adhere to those standards. Otherwise, not only will federal law continue be applied differently in different jurisdictions, but American businesses and other defendants will continue to face arbitrary and excessive punishments that deprive them of their federal due process rights. The Court should grant the petition for a writ of certiorari.

B. The Petition Should Be Granted To Ensure The Integrity Of This Court's Mandate In *State Farm I*

The Court should grant the petition in this case, rather than await additional developments in the state and lower federal courts, because, as the above discussion illustrates, further guidance on the standards for judicial review of punitive damages awards is needed as soon as possible. But an equally compelling reason for the Court to grant this petition rather than await a future case is that reversal of the decision of the Utah Supreme Court is necessary to preserve the integrity of the Court's mandate in *State Farm I*.

When a case is remanded to a state or lower federal court for further proceedings, that court is obligated to conduct those proceedings in accordance with the mandate of this Court. *See Briggs v. Penn. R.R.*, 334 U.S. 304, 306 (1948); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 140 (1940). The opinion of this Court is a part of its mandate, and the lower court is not free to disregard the guidance in the opinion or to reinterpret the opinion to suit its own purposes. *See Rogers v. Hill*, 289 U.S. 582, 587 (1933); *Gulf Refining Co. v. United States*, 269 U.S. 125, 135 (1925). When a lower court has failed to adhere to this Court's mandate, this Court has not hesitated to review the case again in order to ensure that its mandate is respected. *See, e.g., Yates v. Evatt*, 500 U.S. 391 (1991) (reversing the judgment of the South Carolina Supreme Court after granting certiorari three times in the same case); *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464, 469 (1969) (vacating district court order and remanding where order entered settlement that did not comply with this Court's mandate); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) ("If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court."). That course of action is warranted here.

The Utah Supreme Court's decision on remand in this case does not adhere to the mandate of *State Farm I*. This Court's opinion in *State Farm I* instructed that "[a]n application of the [three] guideposts [for review of punitive damages] to the facts of this case . . . likely would justify a punitive damages award at or near the amount of compensatory damages." 538 U.S. at 429. The Court remanded for the Utah courts to calculate the precise amount of punitive damages to be awarded. *Id.* But that remand did not give the Utah Supreme Court license to disregard entirely this Court's assessment of the appropriate penalty. The Utah Court's imposition of punitive damages

equal to nine times the amount of compensatory damages cannot be reconciled with this Court's instruction that a 1-to-1 ratio is likely the highest ratio that is permissible.

Furthermore, this Court specifically determined that the compensatory damages that had been awarded in this case were "substantial," and that they "contained a punitive element." *State Farm I*, 538 U.S. at 429. In direct conflict with that determination, the Utah Supreme Court held on remand that the "compensatory damages award was purged of elements which may have been more properly placed in the category of punitive damages." Pet. App. 15a. And the Utah Court relied on that fact (*id.*) to support its refusal to apply this Court's instruction that a 1-to-1 ratio is the "the outermost limit" consistent with due process "[w]hen compensatory damages are substantial." *State Farm I*, 538 U.S. at 425.

In direct conflict with this Court's opinion, the Utah Supreme Court relied on the plaintiffs' receipt of significant damages for emotional distress to justify an unusually large punitive award. The Utah Court stated that it had "no difficulty concluding that conduct which causes $1 million of emotional distress and humiliation is markedly more egregious than conduct which results in $1 million of economic harm. Furthermore, such conduct is a candidate for the imposition of punitive damages in excess of a 1-to-1 ratio to compensatory damages." Pet. App. 16a. That reasoning flies in the face of this Court's instruction that the large emotional distress award weighed *against* a large punitive award. *See State Farm I*, 538 U.S. at 426.

The Utah Supreme Court's decision on remand departs so clearly and so far from this Court's mandate in *State Farm I* that this Court cannot allow it to stand. That is particularly true because of the high public visibility of this case. Although it is well established that a denial of certiorari creates no legal precedent, *see, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995), a denial can have practical impact – particularly in case as closely watched as this one. *Cf.* Robert L. Stern et al., Su-

preme Court Practice 308-09 (8th ed. 2002) (noting improper tendency of lower courts to attach significance to denials of certiorari). A failure by this Court to take action here could unfortunately be viewed by some courts as acquiescence in the Utah Court's decision. And it could be misinterpreted by some courts as a signal that this Court is not committed to the principles that the Court laid down in *State Farm I*. The Court should send precisely the opposite signal, by granting the petition for a writ of certiorari and reversing the judgment of the Utah Supreme Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and set the case for briefing and argument. In the alternative, the Court should grant the petition and summarily reverse the decision of the Utah Supreme Court.

Respectfully submitted,

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